Supreme Court, U.S.
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No. 98-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JIMMY BOYD,

Petitioner,

VS.

STATE FARM INSURANCE COMPANIES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employee's response to an employer request for medical certification renders moot the 15-day period for response mandated by 29 C.F.R. § 825.305(b) (1998), absent any statutory provision to that effect.

2. Whether the appeals court improperly affirmed summary judgment on race discrimination claims.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jimmy Boyd petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Fifth Judicial Circuit entered in this case on November 3, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is reported at *Boyd v. State Farm Insurance Companies*, 158 F.3d 326 (5th Cir. 1998). It is also reported at 78 Fair Empl. Prac. Cas. (BNA) 524, 136 Lab. Cas. P33,760, and 4 Wage & Hour Cas.2d (BNA) 1825.

The judgment of the District Court for the Northern District of Texas, Dallas Division (Appendix C) in this case is not reported. The District Court's opinion and order (Appendix B) is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on November 3, 1998. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

The following statutes and regulations are substantively implicated by this petition, and are set forth verbatim at Appendix D:[1]

29 U.S.C. § 2612(a)(1)(D) (1994)

29 C.F.R. § 825.115 (1998)

29 C.F.R. § 825.301(a) (1998)

29 C.F.R. § 825.301(b)(1) (1998)

29 C.F.R. § 825.305(a) (1998)

29 C.F.R. § 825.305(b) (1998)

STATEMENT OF THE CASE

This case arises under the Family and Medical Leave Act ("FMLA"), and Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). The central issues presented by this petition are: (1) whether a court of appeals may validly create a "mootness" exception to FMLA implementing regulations requiring a fifteen day waiting period for employee medical certification of need for leave; (2) the degree of detail

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[1] The text of the Code of Federal Regulations provisions, revised in 1998, does not in the cited provisions differ materially from the 1994 version at issue in this case.

necessary to support the opinions of an expert witness in the summary judgment context; and (3) whether apparently racist comments by supervisory personnel are sufficient to raise a triable issue of pretext concerning race discrimination.

It is petitioner's central contention that the Fifth Circuit's decision is at odds with the FMLA and its implementing regulations. It was the express intent of Congress in passing the FMLA to protect employees who have serious health conditions that prevent them from working for temporary periods. 29 U.S.C. § 2601 (1994).

1. *Jimmy Boyd's Complaint*

Jimmy Boyd, who is African-American, began working for State Farm in 1990. He worked in the Administrative Services Department, managed by Terry Vice, under the direct supervision of Bruce Sutton, and advanced to the position of Administrative Services Supervisor III.

In the fall of 1993, during a social event, Mr. Sutton referred to Mr. Boyd as "Buckwheat," an apparent reference to the popular but racially stereotyped character on the *Little Rascals* television series. Mr. Boyd understandably took offense at the remark and complained about it to both Mr. Sutton and Mr. Vice. He also reported to Mr. Vice other

comments made by Mr. Sutton, which included calling Mr. Boyd a "porch monkey." Mr. Vice privately disciplined Mr. Sutton for the remark and apologized to Mr. Boyd.

Until the time he complained about the racist remarks, Mr. Boyd had enjoyed positive performance reviews. In December of 1994, Mr. Boyd received his first performance review (known as a "PPR") since making the complaints, and it was his first significantly negative review.

Mr. Boyd repeatedly sought promotion to the level of Supervisor IV in 1993 and 1994. On June 1, 1995, Mr. Boyd submitted to Mr. Sutton a written complaint about his failure to recommend Mr. Boyd for promotion to the level of Supervisor IV. On August 14, 1995, Mr. Boyd complained to the Equal Employment Opportunity Commission about State Farm's refusal to promote him. Two weeks after this complaint, State Farm promoted Delores Clemons, and African-American woman, to the position of Supervisor IV.

On August 8, 1995, Mr. Boyd requested a medical leave of absence based upon stress and anxiety connected with his work at State Farm. Mr. Boyd was then placed on paid sick leave by State Farm.

During Mr. Boyd's absence from work, State Farm made repeated oral requests for medical certification of his need for leave. Mr. Boyd submitted notes from two physicians in an effort to satisfy State Farm. On September 6, 1995, State Farm sent to Mr. Boyd a written request for medical certification. On September 11, 1995, Mr. Boyd tendered to State Farm another letter from one of his physicians, but that letter did not indicate that Mr. Boyd required a medical leave of absence. On September 15, 1995, nine days after its written request additional medical certification, State Farm terminated Mr. Boyd's employment.

2. *The District Court's Decision*

On July 16, 1996, Jimmy Boyd filed suit against State Farm, Terry Vice, and Bruce Sutton. After his claims against Mr. Vice and Mr. Sutton were dismissed, Mr. Boyd amended his complaint to assert claims against State Farm for race discrimination, hostile work environment, intentional infliction of emotional distress, denial of due process, violations of the Texas Commission on Human Rights Act, and violations of the FMLA.

State Farm filed a motion for partial summary judgment with respect to the race discrimination claims, and

then amended that motion to correct certain technical errors. State Farm then filed another motion seeking summary judgment on Mr. Boyd's other claims.

Mr. Boyd responded to all the motions. He conceded summary judgment was appropriate on his claims for denial of due process and hostile work environment. The district court granted summary judgment on all the remaining claims.

The district court based its decision to grant State Farm summary judgment on the FMLA claim upon two foundations. First, the court concluded that Mr. Boyd had failed to establish his entitlement to leave. Second, the court held that State Farm had not violated the FMLA's notice requirements.

In attempting to establish his entitlement to leave, Mr. Boyd tendered to the district court an affidavit from Dr. Emerson Emory. Dr. Emory's affidavit included the following statements:

> 5. "I have reviewed certain of Jimmy Boyd's medical records, and met with Mr. Boyd personally to conduct a psychiatric examination of him. It is my professional opinion that Mr. Boyd suffered severe emotional distress as a result of his employment at State Farm. Mr. Boyd

> sustained anxiety and an underlying amount of depression. There constituted a serious health condition necessitating a continuing regimen of treatment by a health care provider."
>
> 6. "Based upon my review of the records and my examination of Mr. Boyd, it is my professional opinion that Mr. Boyd's health condition rendered him unable to perform his State Farm, and in fact left him disabled. Continued work at State Farm would have increased his health problems. In my professional opinion, the only solution to Mr. Boyd's medical condition would have been a leave of absence from State Farm. At a minimum, Mr. Boyd required a leave of absence to obtain treatment for his condition."

The district court excluded Dr. Emory's affidavit, concluding that it was vague, conclusory, filled with legal terms of art, and lacked any supporting details concerning Mr. Boyd's condition. Having excluded the affidavit, the district court held that Mr. Boyd had failed to establish the existence of a serious health condition as required by the FMLA.

Mr. Boyd had also contended that State Farm violated FMLA regulations requiring that an employer permit its employee a period of at least fifteen days to respond to a written request for medical certification. The district court

concluded that this issue was "moot," because Mr. Boyd had actual awareness of the request for medical certification and had, in fact, responded to it in fewer than fifteen days.

The district court also granted summary judgment to State Farm on Mr. Boyd's race discrimination claim. The district court held that State Farm had enunciated a legitimate and non-discriminatory reason for its employment decisions about Mr. Boyd. In rejecting Mr. Boyd's attempts to rebut this purportedly valid reason, the court concluded that the racist name-calling constituted "stray remarks" that failed to provide evidence of discrimination. The district court also applied the "same actor" principle to rebut any inference of discrimination. The court concluded that Mr. Boyd had failed to establish any genuine issue of material fact concerning the race discrimination claim, and granted summary judgment to State Farm.

3. *The Fifth Circuit's Opinion*

Mr. Boyd appealed the district court's decision on the race discrimination and FMLA claims to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 (1994). The Fifth Circuit reviewed the district court's

decision *de novo* and affirmed it, generally for the same reasons enunciated by the district court.

In rejecting Mr. Boyd's race discrimination claims, the Fifth Circuit held that Mr. Boyd had failed to adduce any evidence sufficient to permit a reasonable fact-finder to infer discrimination.

With respect to Mr. Boyd's FMLA claim, the Fifth Circuit agreed with the district court that Dr. Emory's affidavit was comprised of unsupported conclusions, and therefore affirmed the district court's holding that Mr. Boyd had failed to establish a fact issue concerning his need for leave. The Fifth Circuit also affirmed the district court's holding with respect to the FMLA notice regulations, concluding that Mr. Boyd "did not need the full fifteen days in which to respond." The Fifth Circuit set forth its general rule:

> In such situations, we hold as a matter of law, that when an employee submits medical information in response to an employer's written request, 29 C.F.R. § 825.305(b) is no longer implicated and the employer is not required to wait fifteen days before taking action on the employee's request for medical leave.

The Fifth Circuit then affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

1. *This Case Presents An Important Federal Statutory Issue That Was Resolved Incorrectly by the Court of Appeals*

The FMLA Notice Provisions

The issue presented by this appeal is critically important to the operation of the FMLA and to millions of potential FMLA litigants. The Fifth Circuit was the first federal appellate court to confront the issue. The importance of this federal statutory issue merits further review. *See, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946).

Under the FMLA, "[a]n employer must give notice of a requirement for medical certification each time a certification is required . . . ." 29 C.F.R. § 825.305(a) (1995). The FMLA also requires written notice of any requirement for medical certification:

> The employer shall also provide the employee with written notice detailing . . . any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so . . . .

29 C.F.R. § 825.301(b)(1)(ii) (1998). This written notice must be provided to the employee no less often than the first time in each six month period that leave is requested. 29 C.F.R. § 825.301(c) (1998). The employer must then permit the employee no less than fifteen days within which to provide the requested certification. 29 C.F.R. § 825.305(b) (1998) (employer "must allow at least fifteen days" after request). Under these rules, State Farm was required to provide Mr. Boyd with written notice of the requirement for medical certification at the time he requested leave, and could not take action against him unless he failed to provide that information within fifteen days of the date of written notice.

In the district and appellate courts, State Farm argued it was not required to provide written notice to Mr. Boyd at the time he requested FMLA leave because it provided notice in the form of an FMLA booklet. Citing 29 C.F.R. § 825.301(c)(2)(ii), State Farm contended subsequent written notice is not required by federal regulations if an employee handbook describing the employer's leave policies clearly provides that medical certification is required. State Farm's argument simply misrepresented the cited regulation. In truth, the regulation states that:

> Subsequent written notification shall *not* be required if the initial notice in the six-months period *and* the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required . . . .

29 C.F.R. § 825.301(c)(2)(ii) (1998) (emphasis in original). It is not enough that the handbook lists certification requirements - there must also be an initial written notice. Subsequent written notice is excused only where both these conditions are met:

> An exception will exist, however, if the notice given at the beginning of the six-month period, as well as any employee handbooks or other written documents regarding the employer's leave policies, make it clear that a medical certification or a fitness-for-duty report will be required under the circumstances of the employee's leave.

HENRY PERRITT JR., 1996 WILEY EMPLOYMENT LAW UPDATE 109 (1996).

Under the governing regulations, State Farm was still required to provide Mr. Boyd with an initial written notice of the need for medical certification at the time he requested FMLA leave. According to State Farm, it did not provide

written notice to Mr. Boyd until September 6, 1995. Having then finally provided the written notice, State Farm failed to wait the mandatory fifteen days before terminating Mr. Boyd. State Farm brazenly disregarded the FMLA. The only summary judgment that would have been appropriate in this situation was partial summary judgment against State Farm based upon its failure to follow federal law.

In affirming the summary judgment granted to State Farm on Mr. Boyd's FMLA claims, the Fifth Circuit held the notice issue was moot. According to the appeals court, Mr. Boyd received the written notice seeking certification dated September 6, 1995, and answered that letter by providing an additional medical report from Dr. Colley on September 11, 1995. The Fifth Circuit thus held that State Farm did not violate federal law by terminating Mr. Boyd before expiration of the fifteen day period imposed by the FMLA. In essence, the appeals court simply chose to ignore the plain requirements of federal law, and (without even purporting to set forth any authority for its action) judicially created an exception to those requirements.

Nothing about the regulations is vague or unclear. As already noted, both the requirement for written notice and the

fifteen day waiting period are plainly set forth in the implementing regulations. Moreover, those regulations make clear that an employer's power to terminate an employee for failure to provide proper certification is conditioned on the employer's compliance with both the written notice and fifteen day waiting period of the FMLA. *See* 29 C.F.R. § 825.311(b) and (c) (1998) ("[employer] must allow at least 15 days" ("if the employer has provided the required notice"). Of particular importance is that nothing in the FMLA establishes any exception to these requirements in situations where the employee has actual notice of the request for additional certification. This would, of course, have been an obvious alternative in drafting the legislation and regulations. What is not said is, in this instance, fatal to the Fifth Circuit's holding. Regardless whether he had actual notice, and regardless whether he had responded once to State Farm's request, Mr. Boyd was entitled to fifteen days before State Farm could terminate his employment.

The "Serious Health Condition"

Of course, State Farm's violation of the FMLA notice requirements mandates reversal only if Mr. Boyd raised a fact issue concerning his entitlement to leave. He did so.

Under the provisions of the FMLA, employees are entitled to protected leave "because of a serious health condition that makes the employee unable to perform the functions of such employee." 29 U.S.C. § 2612(a)(1)(D) (1994). The implementing regulations likewise establish entitlement to leave because of "a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job." 29 C.F.R. § 825.200(a)(4) (1998). Thus, entitlement to leave simply requires a "serious health condition" and an inability to perform essential job functions.

The FMLA defines a "serious health condition" as an illness, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider. 29 U.S.C. 2611(11) (1994). The implementing regulations for the FMLA expressly state a "serious health condition" exists where the plaintiff was unable to work for more than three consecutive days and was either treated two or more times by a health care provider or received a single treatment that resulted in a regimen or continuing treatment:

> A period of *incapacity* (i.e. inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition.

29 C.F.R. § 825.114(a) (1998). "Treatment" includes an examination to determine whether a serious health condition exists. 29 C.F.R. § 825.114(b) (1998). There is no requirement that the "treatments" be addressed toward the curative process; a person who attends two evaluative sessions and misses three calendar days of work satisfies the statutory definition. An employee is unable to perform essential job functions where the employee is unable to work at all, is unable to perform any essential job function, or must be absent from the workplace in order to receive treatment. 29 C.F.R. § 825.115 (1998).

There was no dispute in the district court that Mr. Boyd missed three consecutive calendar days of work at State Farm, and that he was "treated" two or more times by a health care provider. The district court granted summary judgment to State Farm on the FMLA claims based upon its

conclusion that Mr. Boyd had failed to adduce any evidence establishing that he was unable to work.

In opposing State Farm's summary judgment motion, Mr. Boyd tendered the affidavit of Dr. Emerson Emory. The affidavit set forth Dr. Emory's extensive education, training, and qualifications, including licensure as a psychiatrist and internist, along with numerous decorations arising from service in the United States Army and United States Naval Reserve. Dr. Emory testified in his affidavit that he had not only reviewed Mr. Boyd's medical records, but also personally met with and examined Mr. Boyd. Dr. Emory set forth a number of his medical opinions concerning Mr. Boyd, including the following:

> "Mr. Boyd suffered severe emotional distress as a result of his employment at State Farm."
>
> "Mr. Boyd sustained anxiety and an underlying amount of depression."
>
> "[Mr. Boyd had] a serious health condition necessitating a continuing regimen of treatment by a health care provider."
>
> "Based upon my review of the records and my examination of Mr. Boyd, it is my professional opinion that Mr. Boyd's health

> condition rendered him unable to perform his job at State Farm, and in fact left him disabled."
>
> "Continued work at State Farm would have increased his health problems."
>
> "In my professional opinion, the only solution to Mr. Boyd's medical condition would have been a leave of absence from State Farm. At a minimum, Mr. Boyd required a leave of absence to obtain treatment for his condition."

This affidavit, if accepted as true, clearly establishes that Mr. Boyd suffered from a "serious health condition" within the meaning of the FMLA. Mr. Boyd was absent from work while obtaining treatment, and Dr. Emory testified that absence from work was necessary to obtain treatment, largely because the work environment was itself the cause of Mr. Boyd's serious health condition.

The appeals court affirmed the district court's decision to reject Dr. Emory's affidavit on the basis that it failed to enunciate any foundations for the opinions expressed. Affidavits submitted to support or oppose a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is

competent to testify to the matters stated therein." FED. R. CIV. P. 56(e) (West 1998). Affidavits tendered in opposition to a summary judgment motion "made and supported as provided in this rule . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e) (West 1998).

Dr. Emory's qualifications are not questioned, and his affidavit satisfies these requirements. He recited his basis for personal knowledge: a review of the records and personal examination of Mr. Boyd. Dr. Emory's affidavit was far more than a conclusory statement based on generalities. Rather, he specifically set forth a specific diagnosis (depression), the need for further treatment, his opinion that Mr. Boyd could not have returned to work at State Farm, and his basis for reaching that opinion (that the State Farm work environment was responsible for Mr. Boyd's depression, and that an absence for the treatment would be necessary). These statements, standing alone and without further disclosure, satisfied all requirements for expert testimony in the summary judgment setting.

2. *The Fifth Circuit Wrongfully Affirmed Summary Judgment On The Race Discrimination Claims, Denying Petitioner A Trial On Those Claims*

The Fifth Circuit held that Mr. Boyd failed to raise any triable issue of fact with respect to his race discrimination claims. This conclusion was simply incorrect.

State Farm argued its decisions not to promote and to terminate Mr. Boyd were based upon legitimate and non-discriminatory reasons. Mr. Boyd was under no obligation to disprove these claims to overcome summary judgment; that would be an almost insurmountable burden. Rather, he needed only to raise some "triable issue of pretext." This he could do by raising a fact issue as to whether a discriminatory reason more likely motivated State Farm, or whether State Farm's stated reasons were unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Triable issues of pretext existed.

In defending its decision not to promote Mr. Boyd, State Farm contended he was unqualified for the position and that his replacement was an African-American. Neither of these arguments justified summary judgment. But the

opinions of Mr. Vice and Mr. Sutton with respect to Mr. Boyd mysteriously declined following his complaints of racist remarks. Mr. Sutton called Mr. Boyd "Buckwheat" and a "porch monkey." That Mr. Vice and Mr. Sutton testified race was not a factor can - in light of the other evidence - do nothing more than create a fact issue. It is, after all, unlikely that they would testify otherwise. If such testimony were sufficient to entitle State Farm to summary judgment, Title VII would indeed be a hollow promise.

Finally, State Farm's promotion of Delores Clemons is, under the circumstances, more damaging than helpful to the company's cause. Ms. Clemons had less experience than Mr. Boyd, and was promoted shortly after Mr. Boyd had complained to State Farm and the EEOC about his refused promotion. Under these circumstances, a jury might well conclude that State Farm's promotion of Ms. Clemons was itself a pretextual device specifically designed to disguise an act of discrimination.

State Farm's position on termination was, if anything, even less persuasive. The testimony provided by State Farm employees about Mr. Boyd's "replacement" was contradictory. Mr. Boyd's duties at State Farm were

generally referred to as comprising "warehouse" and "fabrications." In the affidavit tendered to the district court, Terry Vice claimed Mr. Boyd was replaced by an African-American named Carl Mason. But Bruce Sutton testified in his deposition that he himself assumed Mr. Boyd's warehouse responsibilities. The fabrications responsibilities were assumed by a white employee and subsequently transferred from the division. These inconsistencies would alone be sufficient to justify an inference of discrimination. As this Court has made clear, disbelief of the proferred reasons is itself sufficient to permit a jury to find that State Farm discriminated against Mr. Boyd. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

CONCLUSION

The opinion of the Court of Appeals represents a decided setback to just and equitable operation of the FMLA. The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Charles Baruch

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APPENDIX A

U.S. COURT OF APPEALS
FILED NOVEMBER 3, 1998
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11396

JIMMY BOYD,

Plaintiff-Appellant,

versus

STATE FARM INSURANCE COMPANIES; ET AL

Defendants

STATE FARM INSURANCE COMPANIES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before JOLLY, BARKSDALE, AND BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Jimmy Boyd appeals a summary judgment on his failure to promote claim and termination claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Family Medical Leave Act. Finding no error, we affirm.

I

Boyd, a black male, began employment at State Farm Insurance Company in 1990 in the Administrative Services Department. Terry Vice managed the Department. Boyd was hired by his immediate supervisor, Bruce Sutton, who selected Boyd over a Caucasian applicant. Over the course of Boyd's employment, either or both Sutton and Vice approved Boyd's numerous raises and promotions. By 1994, Boyd had been promoted to Administrative Services Supervisor III.

There was at least one rough ripple on these otherwise calm waters, however. At a 1993 social event, Sutton called Boyd "Buckwheat." Boyd took offense to the remark and complained to Vice and Sutton. Vice privately discliplined Sutton for the remark who apologized to Boyd.

Whether this incident was isolated or whether it presaged trouble to come is an issue in this appeal. In December of 1994, Sutton gave Boyd his annual Performance Planning and Review Evaluation ("PPR"), which was not as favorable as Boyd's past reviews. Included in the PPR were skills that Boyd needed to improve to be eligible for the promotion to Supervisor IV, a promotion that Boyd had earlier sought unsuccessfully.

On June 1, 1995, Boyd submitted a written complaint to Sutton for failure to promote him to Supervisor IV. Sutton and Vice refused to promote Boyd on the grounds that he was not qualified for the position. Consequently, on August 14, 1995, Boyd complained to the EEOC that State Farm had not promoted him because of his race. Two weeks after Boyd's EEOC complaint, State Farm promoted Delores Clemons, a black woman, to Supervisor IV.

Before these events occurred, however, on August 8, 1995, Boyd had requested a medical leave of absence from work. Boyd contended that he suffered from stress and anxiety. Following its policies under the Family Medical Leave Act, as set forth in its handbook, State Farm approved

Boyd's requested leave of absence. Boyd, who had a copy of the handbook, remained absent from work for over five weeks.

During his absence, in response to State Farm's numerous requests for medical certification as required by the handbook, Boyd submitted a total of three letters written by Drs. Pascoe and Colley, two psychologists who treated him. Each time Boyd responded, State Farm informed him that the letters were insufficient to support his leave of absence and that he should return to work immediately.

On September 6, 1995, State Farm sent Boyd a written request for medical certification, which also informed Boyd that his absence from work had now been classified as Absent Without Official Leave ("AWOL") and that Boyd would be subject to termination unless he provided immediate documentation of a medical need for his absence. Boyd submitted a second note from Dr. Colley on September 11, 1995, which again failed to indicate that his leave of absence was medically required. Consequently, on September 15, 1995, approximately nine days after its written request for documentation, State Farm terminated Boyd. Sutton took no

part in the action. At the time of his termination, Boyd had been classified as AWOL for ten days. Shortly before and after State Farm fired Boyd, it had also terminated Lisa Bitters, a Caucasian female, and Johnny Kirby, a Caucasian male, for being AWOL for only three and two days, respectively.

Contending that State Farm refused to promote him and eventually terminated him because of his race, Boyd brought suit under Title VII. Boyd also alleged that his termination violated the FMLA because his absence was protected leave under the Act. The district court granted summary judgment for State Farm on each of Boyd's claims. In granting summary judgment on the FMLA claim, the district court elected to disregard Boyd's expert affidavit. On April 2, 1998, Boyd filed this appeal.

II

We review the district court's grant of summary judgment *de novo*. Walton v. Bisco Industries, 119 F.3d 368, 370 (5th Cir. 1997). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III

A

Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). We continue to adhere to the evidentiary framework of Title VII claims as established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In the context of summary judgment, a substantial conflict in evidence must exist to create a jury question on the issue of discrimination. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 983 (5th Cir. 1996) (en banc). Therefore, a plaintiff can defeat a motion for summary judgment only if the evidence, taken as a whole: (1) created a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) creates a reasonable inference that race was a determinative factor in the actions of which the plaintiff complains. Walton, 119 F.3d at 370; Rhodes, 75 F.3d at 994.

Appendix - 7
B

(1)

Boyd contends that the district court erred in granting summary judgment on his Title VII failure to promote claim. We assume, as did the district court, that Boyd established a prima facie case on this claim. Our immediate inquiry is whether State Farm met its burden of offering a legitimate reason for its adverse employment action. In its motion for summary judgment, State Farm asserted that Boyd was not qualified for promotion. State Farm produced Boyd's 1994 PPR, which stated that Boyd had achieved only seven of ten performance goals, that he was on schedule to achieve an eighth goal, but that he would not achieve the last two goals. The PPR further stated that Boyd needed to make his work system more productive and improve on organization, communication, and project planning. Finally, State Farm emphasized that Boyd never challenged the accuracy of the PPR, but indeed indicated his agreement with it by signing the PPR on the date it was completed.

In opposition, Boyd argued that he only had the burden of creating a triable issue of pretext. Boyd asserted

that at a 1993 social gathering Sutton called him "Buckwheat," and on some other unspecified occasion he had also called him a "Porch Monkey." Relying solely on his affidavit testimony, Boyd further contended that someone told him "State Farm does not hire many people like you . . . you should be happy just to be here." However, Boyd identified neither who made this remark, nor when. Finally, Boyd concluded that the timing of his 1994 PPR created a triable issue of pretext because it occurred only after he complained of the alleged racist remarks.

The district court granted summary judgment in favor of State Farm. The district court held that even if the "Porch Monkey" and "Buckwheat" comments were assumed to be racist, the comments were merely stray remakrs and did not infer discrimination. The district court rejected the remaining comments as self-serving and unsupported. Regarding the 1994 PPR, the district court reasoned that the "same actor" principle rebutted the inference that Sutton would discriminate against Boyd because Sutton was the same individual who initially hired Boyd.

(2)

Because Boyd focused solely on proving pretext and offered no evidence from which a reasonable fact-finder could infer that race motivated State Farm's decision not to promote him, the ultimate issue for this court is whether Boyd's failure to promote claim is within the Rhodes subcategory of cases where "[a] jury may be able to infer discriminatory intent . . . solely from substantial evidence that the employer's proffered reasons are false." Rhodes, 75 F.3d at 994. We conclude that Boyd's pretext evidence is insufficient to carry the day.

During Boyd's five-year tenure at State Farm, Sutton referred to Boyd as "Buckwheat"[1] only once. The district

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[1] "Buckwheat" is the stereotypical black character from the "Our Gang" or "Little Rascals" television series. However, in the context of employment discrimination law, the term "Buckwheat' is generally considered to be a racial slur or epithet. See Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266 (7th Cir. 1991); Dunbar v. Landis Plastics, Inc., 996 F. Supp. 174, 184 (N.D.N.Y. 1998); Lenoir v. Roll Coater,

court properly categorized this isolated utterance as a stray remark from which no reasonable fact-finder could infer race discrimination. The mere utterance of a racial epithet is not indicia of discrimination under Title VII. Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1295 (5th Cir. 1994).[2] Second, the alleged "Porch Monkey" comment and the other remarks proferred by Boyd are similarly inadequate to meet his burden. There is no evidence of a causal connection between there isolated remarks and the decision not to promote Boyd. Absent a causal link between the references and the conduct complained of, such epithets become stray remarks that cannot support a discrimination

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Inc., 841 F. Supp. 1457, 1461 (N.D. Ind. 1992); Harris v. International Paper Co., 765 F. Supp. 1509, 1518 (D. Maine 1991).

[2]See also, Brown v. CSC Logic, Inc., 82 F.3d 651, 656 (5th Cir. 1996) (specific comments over a lengthy period of time sufficient to establish discrimination); Guthrie v. Tifco Industries, 941 F.2d 374, 379 (5th Cir. 1991) (comments made at least a year prior to demotion insufficient to infer discrimination); Daniels, 937 F.2d at 1266 (discrimination prevalent where employee was nicknamed "Buckwheat" for first ten years of employment and subjected to other racial taunts).

verdict. Ray v. Tandem Computers, 63 F.3d 429, 434 (5th Cir. 1995). Finally, the timing of Boyd's 1994 PPR, approximately one year after Boyd complained of Sutton's "Buckwheat" comment, provides no proof from which a reasonable juror could infer discrimination in the failure to promote claim.[3] Timing standing alone is not sufficient absent evidence of other pretext. Swanson v. General Services Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997); Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In the end, Boyd's summary judgment evidence has fallen considerably short of the mark. State Farm's uncontroverted evidence on its refusal to promote Boyd is sufficient to negate the existence of any material fact on the issue of its discriminatory motive. Wallace v. Texas Tech University, 80 F.3d 1042, 1048 (5th Cir. 1996). The district court did not err in entering summary judgment against Boyd on his failure to promote claim.

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[3]The district court applied the "same actor" inference to dispose of this issue. Our disposal of Boyd's failure to promote claim under Rhodes and its progeny forecloses the necessity of a second analysis of the case under the "same actor" inference. Brown, 82 F.3d at 658 n. 25.

C

(1)

Boyd next contends that the district court erred in granting summary judgment on his Title VII discriminatory termination claim. Again, we will assume that Boyd established a prima facie case of discrimination. We thus turn to determine whether Boyd successfully rebutted State Farm's proferred reason for his termination.[4]

State Farm argued that it terminated Boyd because Boyd had been AWOL from work for ten days and had failed to prove that his absence was medically necessary under its FMLA policy. State Farm offered the affidavit testimony of the human resources personnel who made the decision to fire Boyd, and the September 6, 1995 notice it sent Boyd informing him of his AWOL status. In response, Boyd asserted that State Farm's proffered reason was pretext because initially he had been out on sick leave before his status was changed to AWOL. Boyd further maintained that

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[4]We apply the same analysis to Boyd's termination claim as applied to Boyd's failure to promote claim. See Walton, 119 F.3d at 370; Rhodes, 75 F.3d at 994.

other Caucasian employees were also out on sick leave but not terminated for being AWOL. The district court rejected both arguments and granted State Farm's motion for summary judgment.

(2)

We have previously recognized that proof that similarly-situated employees outside of plaintiff's protected class were treated differently may assist in establishing the prima facie case. Walton, 119 F.3d at 372; Nieto v. L&H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997). However, State Farm has produced unrefuted evidence that other Caucasian employees were also terminated for their AWOL status. Under these circumstances, State Farm's decision to terminate Boyd for his AWOL status does not raise a material question of fact that Boyd's termination was motivated by racial animus. The district court's grant of summary judgment on Boyd's discriminatory termination claim is therefore affirmed.

IV

A

(1)

Boyd's final argument is that the district court erred in granting summary judgment on his claim under the Family Medical Leave Act. State Farm moved for summary judgment on the grounds that Boyd's absence from work was not protected under the FMLA because he suffered from no serious health condition at the time he requested leave, as required by the Act. State Farm offered three letters from Boyd's treating physicians, Drs. Pascoe and Colley. State Farm also offered the deposition testimony of these doctors. None of their letters supported Boyd's claim that his absence, purportedly due to the stress and anxiety of his job, constituted protected leave under the FMLA. Further, both physicians testified in their depositions that Boyd was not incapacitated within the meaning of the Act. Boyd responded that the affidavit testimony of his expert witness, Dr. Emerson Emory, created a genuine issue of fact as to whether he suffered a serious health condition under the FMLA.[5] State Farm objected to the affidavit on the grounds

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[5]Dr. Emory's affidavit, in pertinent part, stated:

that it came two years "after-the-fact" and contradicted the diagnosis of the physicians who treated Boyd at the time of his termination.

The district court characterized the affidavit as "vague and conclusory" because it contained no details as to how, why, or to what extent Boyd was allegedly incapacitated. The district court acknowledged that the expert's statements were made two years after Boyd's termination and reflected no professional opinion formed contemporaneously with the events at issue. The district court further stated that the affidavit provided no foundation for Dr. Emory's conclusions and spoke only in the most general of terms. In short, the district court excluded the affidavit.

"[B]ased upon my review of the records and my examination of Mr. Boyd, it is my professional opinion that Mr. Boyd's health condition rendered him unable to perform his job at State Farm, and in fact left him disabled. Continued work at State Farm would have increased his health problems. In my professional opinion, the only solution to Mr. Boyd's medical condition would have been a leave of absence from State Farm. At a minimum, Mr. Boyd required a leave of absence to obtain treatment from his condition."

On appeal, Boyd argued that Dr. Emory's affidavit could not be excluded on the grounds assigned because Fed. R. Evid. 705 permitted Dr. Emory to give his opinion without prior disclosure of the underlying facts and data. Boyd contends that the district court was required to permit Dr. Emory to supplement his opinion if the court deemed the disclosure of facts, data, and reasons necessary to decide the motion for summary judgment.

(2)

With respect to expert testimony offered in the summary judgment context, the trial court has broad discretion to rule on the admissibility of the expert's evidence and its ruling must be sustained unless manifestly erroneous. Christophersen v. Allied-Signal Co., 939 F.2d 1106, 1109 (5th Cir. 1991) (en banc). We have previously rejected the argument that, in the context of summary judgment, Fed.R. Evid. 705 does not require an expert's affidavit to contain factual support for the opinion expressed therein. Slaughter v. Southern Talc. Co., 919 F.2d 304, 307 n.4 (5th Cir. 1990). For the purposes of summary judgment under Fed. R. Civ. P. 56(e), an expert affidavit must include materials on which the

expert based his opinion, as well as an indication of the reasoning process underlying the opinion.

It is against this backdrop that we decide the issue before us. We need not address State Farm's argument that Dr. Emory's opinion is "after-the-fact," because notwithstanding when the opinion was made, it is insufficient to create an issue of fact as to whether Boyd suffered a serious health condition under the FMLA. The opinion offers nothing more than the unsupported conclusion that Boyd's medical condition left him "unable to perform his job." It is a well established rule that without more than his credentials and a subjective opinion, an expert's testimony that a medical condition simply "is so," is not admissible. Hayter v. City of Mount Vernon, No. 98-40071, slip op. at 5597 (5th Cir. Sept. 21, 1998) (citations omitted). The district court did not commit manifest error in rejecting the affidavit.

B

(1)

Boyd also contends that his termination violated the FMLA because State Farm failed to wait fifteen days after its

written request for medical certification to terminate him. Boyd based his claim on 29 C.F.R. § 825.305(b), which states in pertinent part:

> ". . . [T]he employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days aftre the employer's [written] request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent good faith efforts."

State Farm counters that because Boyd knew of the medical certification requirement and had made numerous attempts to comply with the FMLA, the fifteen-day allowance was not required. The district court agreed and held that since Boyd had answered State Farm's written request for medical certification the issue of whether Boy's termination in less than fifteen days violated the FMLA was moot.

(2)

We agree that a fifteen-day allowance is not required in this case. State Farm provided Boyd a copy of its FMLA policy, which he reviewed immediately before requesting leave from work. Moreover, State Farm urged Boyd several times by phone to comply with the FMLA medical certification requirement. In response to these requests Boyd submitted a total of three doctors' notes, none of which diagnosed his absence as medically required. Thus, it is clear that before Boyd was terminated, he had been given more than adequate notice of the FMLA certification requirement and had made several attempts to comply with the Act. Next, State Farm sent its written notice, to which Boyd responded with yet another physician's note on September 11, 1995. This note also failed to support Boyd's claim that his absence from work was medically necessary.

The regulation at issue, 29 C.F.R. 825.305(b), simply provides that an employee must be allowed a minimum of fifteen days to respond to an employer's written request for medical certification. Here, Boyd submitted the medical

information in approximately five days after he received State Farm's written request, and consequently, did not need the full fifteen days in which to respond. In such situations, we hold as a matter of law, that when an employee submits medical information in response to an employer's written request, 29 C.F.R. 825.305(b) is no longer implicated and the employer is not required to wait fifteen days before taking action on the employee's request for medical leave. The district court appropriately regarded the issue as moot under the circumstances presented here. The district court's grant of summary judgment on the FMLA claim in favor of State Farm is AFFIRMED.

V

For the aforementioned reasons, the judgment of the district court is hereby

AFFIRMED.

APPENDIX B

FILED NOVEMBER 17, 1997
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JIMMY BOYD,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1976-T
	§	
STATE FARM	§	
AUTOMOBILE	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's Amended Motion for Partial Summary Judgment, filed on April 14, 1997, which is incorporated by reference into Defendant's pending Motion for Summary Judgment, filed on July 31, 1997. The motions

are opposed. After consideration, the Court is of the opinion that the motions should be granted.

This is an employment discrimination suit. Plaintiff Jimmy Boyd filed suit against Defendant State Farm Automobile Insurance Company on July 16, 1997, alleging race and gender discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and under 42 U.S.C. § 1981 in connection with his termination and State Farm's failure to promote him. With leave of Court, Boyd filed his First Amended Complaint, on March 6, 1997, adding causes of action for a racially hostile environment, denial of due process, intentional infliction of emotional distress, violation of the Family and Medical Leave Act (FMLA), and violation of the Texas Commission on Human Rights Act (TCHRA).

On March 14, 1997, State Farm filed the Motion for Partial Summary Judgment, which addressed only the claims in Boyd's original complaint. On April 14, 1997, State Farm filed the Amended Motion for Partial Summary Judgment-which the Court will consider herein and will refer to as "the

amended motion"-to correct a technical error in the original dispositive motion, this mooting the earlier-filed motion.

Thereafter, the Court allowed an extension of time to file dispositive motions. On July 31, 1997, State Farm filed the Motion for Summary Judgment, which the Court will consider herein and will refer to as "the motion." The motion requests summary judgment on only the claims which Boyd added in the amended complaint, but it states that the motion incorporates the amended motion, which seeks summary judgment on Boyd's original claims. Thus, State Farm moves for summary judgment on all of Boyd's claims in his amended complaint by way of the amended motion and the motion. The Court now considers the two dispositive motions together.

Summary judgment should be entered only where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The movant bears the burden of establishing the proprietary of summary judgment. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *Id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248.

Factual Background

Boyd began working for State Farm in 1990 in the Administrative Services Department, which Terry Vice managed under the direct supervision of Bruce Sutton. State Farm refused Boyd a promotion in 1995, and on September 15, 1995, State Farm terminated Boyd's employment. At the time of his termination, Boyd had advanced to the position of Administrative Services Supervisor III. Boyd complains that State Farm discriminated against him on the basis of race and gender when it failed to promote him and which it terminated his employment.

Boyd complains that evidence of State Farm's discriminatory employment practices surfaced in the fall of

1993 when supervisor Sutton referred to Boyd, an African-American male, as "Buckwheat," the popular African-American character on the *Little Rascals* television series. Boyd states that Sutton also referred to him as "porch monkey" and made veiled innuendos and snide remarks about Boyd's race. When Boyd complained to his supervisor, Vice, about the alleged racist remarks, he states that he suffered retaliation in the form of poor performance reviews. Additionally, Boyd claims that various unnamed State Farm employees told him that the company did not hire many people "like you," which Boyd alleges was a reference to his race, and he was told that "you should be happy just to be here."

Boyd maintains that he repeatedly sought promotion to the level of Supervisor IV, but State Farm denied him this promotion. In June of 1995, Boyd submitted a written complaint to Sutton concerning his failure to recommend Boyd for promotion.

On August 8, 1995, Boyd requested a medical leave of absence, based upon stress and anxiety which he claimed arose from his employment with State Farm. Boyd

submitted a brief doctor's note with the written request for leave. Boyd was then absent from work for over five weeks. During that time, he submitted two more doctor's notes regarding his medical condition. State Farm, however, asserts that these letters did not support his leave of absence from work. State Farm alleges that it attempted to convince Boyd to either return to work or to submit proper medical documentation to support a medical leave of absence, but that its efforts failed.

During his leave, on August 14, 1995, Boyd complained to the Equal Employment Opportunity Commission about State Farm's failure to promote him. On August 28, 1995, after Boyd's complaint to the EEOC became known, State Farm promoted Delores Clemons, an African-American woman, to the position which Boyd sought, Supervisor IV.

On September 5, 1995, after Boyd had been absent from work for approximately one month, State Farm formally classified boyd as absent without leave (AWOL). By letter dated September 6, 1995, State Farm informed Boyd of his AWOL status. Boyd did not return to work. Ten days after

classifying Boyd as AWOL, on September 15, 1995, State Farm terminated his employment and sent him written notice of that fact. The notice stated that State Farm terminated Boyd because he had been AWOL for ten days.

Boyd claims that both his failure to be promoted and his termination were motivated by racial animus. Boyd also alleges claims against State Farm for a hostile work environment, intentional infliction of emotional distress, denial of due process, and violations of the Texas Commission on Human Rights Act. He further claims that State Farm terminated him in violation of the Family and Medical Leave Act. State Farm now moves for summary judgment as to all of Boyd's claims.

Claim for Violation of the FMLA

Boyd claims that State Farm terminated him in violation of the Family and Medical Leave Act when, on August 8, 1995, he took a leave of absence due to the mental and emotional strain of his job. State Farm moves for summary judgment on this claim on the basis that Boyd was not entitled to FMLA leave and, therefore, his termination was not improper under the FMLA.

The FMLA allows an employee to take protected leave from work under various circumstances. The FMLA states one justification for leave is "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital or other medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). Boyd claims that he fits in the second category, that is, his mental condition required continuing treatment.

The enabling regulations further define a serious health condition involving continuing treatment as including:

> A period of *incapacity* (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition.

29 C.F.R. § 825.114(a)(2)(i) (emphasis in original). There is no dispute that Boyd missed more than three consecutive

work days and received either evaluation or treatment for his mental condition more than two times. But, by the very terms of this regulation, Boyd's prolonged absence and medical treatment do not, absent incapacitation, confer on Boyd the status of one who suffered from a serious health condition.

In other words, Boyd's subjective belief that he was suffering from a serious health condition and needed the leave of absence is not the issue. The crucial question, rather, is whether Boyd was *incapacitated* to such an extent that he could not go to work. If Boyd was not incapacitated with the meaning of the FMLA for the weeks he was out of work, then Boyd was not suffering from a serious health condition, his leave was not protected under the FMLA, and his termination was not illegal under the FMLA. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 333-35 (5th Cir. 1995).

State Farm argues that Boyd did not suffer from a serious health condition at the time of his absence from work which prevented him from performing the essential functions of his job. In support, State Farm submits three letters from

Boyd's doctors along with their deposition testimony.[6] After reviewing this evidence, the Court can find no support for Boyd's claim that he was incapacitated by a mental and emotional state of such magnitude that he could not attend work for almost six weeks.

The first letter State Farm offers is from Dr. John Pascoe, a medical doctor with Kaiser Permanente who examined Boyd on August 8, 1995, at the time Boyd began his absence from work. The letter, dated August 9, 1995, is addressed to Dr. Marharet Sowada, State Farm's physician who monitors employee medical absences, and states:

> I saw Jimmy Boyd for a psychiatric evaluation yesterday, 8/8/95. His diagnosis is Adjustment Disorder with anxiety versus occupational problem. I referred him to Dr. David Colley, Ph.D., for psychotherapy. I do not feel he needs medications at this time.

(Def.'s Mot. for Summ. Judgmt. Exh. B-2). As a matter of law, this letter in no way indicates that Boyd was unable to perform the functions of his job and needed a medical leave of absence from work.

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[6]Boyd does not object to any of this evidence.

The second letter Boyd submitted to State Farm in support of his claim for medical leave is that of Dr. David Colley, psychotherapist, dated August 14, 1995. It is addressed to "whom it may concern" and states:

> I met with Mr. Boyd on 8-10-95 at the Kaiser Permanente North Dallas Office. He was referred to me by Dr. John Pascoe. I reviewed with Mr. Boyd the stressor sources he stated existed in his life, mainly regarding work situations. He appeared to understand these and had already begun an appropriate program to deal with these, including stress management activities and exercise. I agreed with Dr. Pascoe's diagnosis of Adjustment Disorder with anxiety. Mr. Boyd may return to sessions with me as he wishes to resolve these issues.

(Def.'s Mot. for Summ. Judgmt. Exh. B-3). As with the first, this letter fails to state, imply, or otherwise indicate that Boyd's condition was such that he needed a medical leave of absence from work for treatment or recovery. From the last sentence of the letter, treatment sessions with Dr. Colley for Boyd's affliction appear optional, which would indicate that Boyd's condition is not serious within the meaning of the FMLA.

The third letter Boyd provided to State Farm in support of his medical leave is also from Dr. Colley and is dated September 11, 1995. This is the letter Boyd provided to State Farm in response to its written request for medical certification of the need for his absence issued on September 6. Dr. Colley states:

> I met with Mr. Boyd on 8-10-95 and 8-28-95 at the Kaiser Permanente North Dallas office. He was advised to begin an appropriate program to deal with his responses to stressor sources which he stated existed in his life, primarily regarding work situations. This program might include stress management and exercise, as well as the appropriate resolution of conflict.
>
> Mr. Boyd states that his stressor responses would be positively influenced if he were given the opportunity to work in an area away from his present work area, which he states is the source of his stress.
>
> Mr. Boyd may return to sessions with me as he wishes in order to address these issues.

(Def.'s Mot. for Summ. Judgmt. Exh. B-1). As with the other two letters, there is noting in this one which indicates that Boyd was so incapacitated that he needed a medical leave of absence for treatment or recovery from his mental condition.

According to this letter, Boyd only had two therapy sessions with Dr. Colley during the period from when his absence began to the date of his termination. Nothing in the record indicates that Boyd needed six weeks off from work to attend two sessions with a therapist to recover.

Neither does the record reflect that Boyd's treatment, including any after-effects from treatment, required special measures which would take up so much of his time-or leave him feeling so unwell-as to prevent him from going to work.[7] In fact, Dr. Colley's general prescription for treatment includes stress management and exercise, benign mediums engaged in every day by millions of working people to relieve stress and anxiety. In summary, the Court concludes that, as a matter of law, these letters do not support Boyd's claim that he was incapacitated and suffered from a serious health condition requiring a leave of absence.

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[7]The FMLA regulations provide examples of treatments which would sufficiently incapacitate a person so as to require some leave of absence, whether intermittent or continuous. Examples include chemotherapy, radiation treatment and physicial therapy. 29 C.F.R. 825.114.

State Farm's assertion that Boyd was not incapacitated within the meaning of the FMLA is further strengthened by the deposition testimony of Dr. Colley and Dr. Pascoe. For example, in response to the question, "Would you say based on your evaluation, there was any reason that Mr. Boyd needed to be absent from work for multiple treatments for his condition?", Dr. Pascoe replied in part, "Based on my own assessment, I would say no." (Pascoe Dep. at 42, 11. 10-15). Also, Dr. Pascoe did not find that Boyd was affected by his condition such that he was incapacitated or unable to attend work for three or more consecutive days. (*Id.* at 41, 11. 1-8).

Dr. Colley, the psychotherapist who treated Boyd during his leave of absence, agreed in his deposition testimony that Boyd's treatment sessions with him were optional, Colley Dep. at 32, 11. 20-24, and that at the time of his sessions with Boyd, he did not see the need for Boyd to be absent from work for multiple treatments for his condition, *Id.* at 51, 11. 23-25; 52, 11. 1-2. He further affirmed that he did not intend either of the letters he wrote

for Boyd to certify a lease of absence for him. (*Id.* at 33, 11. 1-8). At the deposition, counsel asked Colley:

> So is it fair to assume from your decision not to issue that kind of certification [for leave], that in your professional analysis, you didn't consider his-you didn't think that his psychological well-being required him to take such a leave of absence?

(*Id.* at 39, 11. 13-18). Colley responded, "Overall I would say that's a fair statement that I agree with, yes." (*Id.* at 39, 11. 24-25). This evidence clearly indicates that Boyd was not incapacitated during his leave of absence.

In his response to the motion, Boyd alleges that his leave of absence from work starting on August 8, 1995, until his termination on September 15, 1995, qualifies under the FMLA as protected leave. Boyd argues that the regulations provide that an employee is incapacitated-that is, unable to perform essential job functions-where the employee is unable to work at all, is unable to perform any essential job function, or must be absent from the workplace in order to receive treatment. 29 C.F.R. § 825.115. The only evidence Boyd submits in support of his claim of incapacity due to a serious health condition is the affidavit of Dr. Emerson Emory, which

states that "Mr. Boyd suffered severe emotional distress as a result of his employment at State Farm." (Emory Aff. ¶ 5.) Dr. Emory also states:

> Based upon my review of the records and my examination of Mr. Boyd, it is my professional opinion that Ms. Boyd's health condition rendered him unable to perform his job at State Farm, and in fact left him disabled. Continued work at State Farm would have increased his health problems. In my professional opinion, the only solution to Mr. Boyd's medical condition would have been a leave of absence from State Farm. At a minimum, Mr. Boyd required a leave of absence to obtain treatment for his condition.

(Emory Aff. ¶ 6.) Boyd argues that this affidavit directly conflicts with the evidence which State Farm submitted and, consequently, creates a fact issue as to whether Boyd suffered from a serious health condition, thus preventing summary judgment on his claim brought under the FMLA.

In reply, State Farm argues that Dr. Emory's affidavit is filled with conclusory statements and is incompetent as summary judgment evidence. State Farm also points out that, while the statements of Boyd's own treating physicians in letters drafted at the time of his termination did not indicate that Boyd was incapacitated, Dr. Emory's statements to the

contrary were made two years after the events at issue here and reflect no professional opinions formed contemporaneously with the events surrounding Boyd's termination.

The Court has reviewed the evidence of both parties and concludes that, as a matter of law, Boyd was failed to place in dispute the fact that he did not suffer any incapacity due to a serious health condition, which is a required element of a claim under the FMLA. *See Price*, 119 F.3d at 333-35. The Court is of the opinion that Dr. Emory's affidavit is incompetent summary judgment evidence in that it is vague, conclusory, and replete with legal terms of art. Specifically, the affidavit provides no foundations for Dr. Emory's conclusions and speaks in only the most general of terms. The affidavit is so devoid of details as to why or in what way Boyd was incapacitated, as to any course of treatment, or as to the nature and extent of Boyd's supposed incapacitation. Furthermore, the affidavit does not state when Dr. Emory examined and evaluated Boyd, which seems in this instance crucial given the nature of Boyd's problem. In short, the affidavit seems designed to do nothing more than attempt to

gloss over the fact that Boyd has no evidence to support his claim of incapacitation. The Court is free to disregard any affidavit that is merely conclusory or appears to be made in bad faith. *See* FED. R. CIV. P. 56(g); *Grimes v. Tx. Dep't Mental Health and Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996).

Because the Court concludes that Boyd was not incapacitated within the meaning of the FMLA, the Court necessarily must conclude that Boyd did not suffer from a serious health condition. As such, Boyd was not entitled to leave under the FMLA. As a matter of law, then, State Farm could not have committed a violation of the FMLA in terminating Boyd. The Court, therefore, grants summary judgment on this claim.

In the alternative, State Farm requests summary judgment on Boyd's FMLA claim because, even assuming Boyd met the statutory and regulatory definitions of a person qualified for FMLA leave, Boyd failed to provide proper medical certification to State Farm to support such a leave despite State Farm's requests to him to do so. As a consequence, State Farm concludes, Boyd's leave of absence

fell outside the provisions o the FMLA and his termination for an unauthorized absence was lawful.

The FMLA allows an employer to request medical certification of an employee's need for FMLA leave. 29 U.S.C. § 2613. The certification must include that date on which the health condition commenced, the probably duration of the condition, appropriate medical facts regarding this condition, and a statement that the employee is unable to perform the functions of his or her employment. 29 U.S.C. § 2613(b). If an employer requires such a medical certification before granting FMLA leave, however, the employer must give adequate written notice to the employee of the requirement. 29 C.F.R. § 825.301. The employer must then give the employee fifteen days from the date of the employer's request to provide the medical certification. 29 C.F.R. § 825.305(b).

State Farm alleges that it gave notice to Boyd of the requirement for proper medical certification in the form of the FMLA handbook it furnished to Boyd, which Boyd admits having reviewed before seeking FMLA leave. (Boyd Dep. at 130, 11. 7-13). State Farm's FMLA handbook states that

medical certification is automatically requested for any leave in excess of five days, which Boyd's absence clearly was. In addition, State Farm states that its employees contacted Boyd by phone on several occasions and orally requested that Boyd provide medical certification of his need for a leave of absence. Aside from the handbook, State Farm gave official written notice to Boyd of the need for medical certification on September 6, 1995. State Farm thus argues that Boyd had notice that he had to submit his medical certification, and that he failed to fulfill that obligation.

Although Boyd submitted three letters from his doctors, State Farm argues that these notes did not contain the information necessary for State Farm to determine the nature and duration of Boyd's inability to work and necessary leave of absence, if any. As such, State Farm maintains that Boyd did not meet the requirements for obtaining FMLA leave, and his termination was thus not prohibited under the FMLA.

Boyd responds that State Farm has misread the FMLA requirements concerning notice to employees of the obligation to submit medical certification. Specifically, Boyd

complains that State Farm had to give him written notice aside from the FMLA handbook and oral requests to obtain a medical certification and that State Farm had to wait fifteen days from its request for Boyd to response before taking an adverse action against him. It is undisputed that on September 6, 1995, State Farm sent Boyd a letter ordering him to submit a medical certification for his leave of absence. It is also undisputed that only nine days later, on September 15, State Farm terminated Boyd.

Boyd does not argue that he did not receive actual notice of the certification requirement from State Farm before September 6, or that he submitted a medical certification sufficient under the FMLA to establish his incapacity. Boyd's own deposition testimony and handwritten notes of conversations with State Farm's human resources personnel reveal that Boyd had ample knowledge of his obligation to provide medical certification for his absence. (Boyd Dep. at 130-134). Instead, Boyd argues only that he did not receive proper written notice of his obligation to submit medical certification until State Farm's letter of September 6, and that

his termination less than fifteen days later was, therefore, in violation of the FMLA.

The FMLA regulations that an employer should provide written notice of an employee's obligation to provide medical certification. 29 C.F.R. §§ 825.301(b)(1)(ii) and (c)(2)(i-ii); 825.305(a). Boyd argues that the written notice requirement is separate and apart from any notice in an employee handbook, while State Farm interprets these regulations to mean that the handbook notice can suffice as the initial written notification requiring an employee to provide medical certification.

The Court concludes that the issue of whether State Farm gave insufficient written notice to Boyd of his obligation by not waiting fifteen days before terminating him is moot. State Farm's written notification was dated September 6. Boyd *answered* State Farm's written demand on September 11, 1995, with the second letter from Dr. Colley discussed above. State Farm then waited until September 15 to terminate Boyd. State Farm was not obligated to wait five more days on the off-chance that it

might hear from Boyd again before terminating him because Boyd had already responded. 29 C.F.R. § 825.305(b).

The fact that State Farm considered Boyd's response insufficient proof of his need for a medical leave of absence is not the issue with which Boyd disagrees on his challenge to State Farm's notification procedure. Boyd claims only that State Farm failed to wait the prescribed fifteen days after sending written notice to him that he had to provide medical certification for his leave to terminate him. The Court concludes that Boyd's challenge to his termination on the basis of insufficient notice under the FMLA fails as a matter of law. The Court grants summary judgment on Boyd's claim brought pursuant to the FMLA.

Race Discrimination Claim on Denial of Promotion

Boyd claims that State Farm, and specifically his supervisors Bruce Sutton and Terry Vice, failed to promote him to the position of Administrative Services Supervisor IV because of his race in violation of Title VII, 42 U.S.C. § 1981 and the Texas Commission on Human Rights Act. State Farm moves for summary judgment on this claim, contending

that it declined to promote Boyd because of his job performance and not because of his race.[8]

There is no question that, on summary judgment, Boyd must state a prima facie cases for racial discrimination. *See Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Then the burden shifts to State Farm to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.* Once State Farm has supported the proffered reason with sufficient evidence, the burden reverts to Boyd to prove that the proffered reason is pretextual. *Id.* at 515.

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[8]Defendant states that the same legal analysis applies to both the Title VII claim and the § 1981 claim. Plaintiff does not argue for a different standard to be applied to the § 1981 claim. For purposes of this motion, the Court will consider the two claims together under the same legal standard. *See Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980). In addition, the evaluation of Plaintiff's state claim under the TCHRA is identical to that of his federal claim under Title VII. *See Dallas Fire Fighters Ass'n v. City of Dallas*, 885 F.Supp. 915, 927 (N.D. Tex. 1995) (citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-17 (Tex. 1987).

To show pretext, Boyd must demonstrate "*both* that the reasons were false, *and* that [race] discrimination was the real reason." *Id.* (emphasis in original); *see also Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996 (en banc). In tandem with the prima facie case, the evidence allowing rejection of the employer's proffered reason will often permit a finding of discrimination without additional evidence. *Rhodes*, 75 F.3d at 994. Accordingly, Boyd can avoid summary judgment if the evidence, taken as a whole: (1) creates a fact issue as to whether each of State Farm's stated reasons were what actually motivated State Farm; and (2) creates a reasonable inference that race discrimination was not a determinative factor in the actions of which Boyd complains. *Id.* at 993.

State Farm first argues that Boyd has failed to state a prima facie case for denial of a promotion based on race discrimination. State Farm asserts that the elements of a prima facie case which Boyd must meet on this claim are: (1) that he is a member of a protected class; (2) that he was qualified for the promotion; (3) that State Farm rejected him for the promotion; and (4) that State Farm ultimately gave the

promotion to a person outside of Boyd's protected class. *See Grimes v. Tx. Dep't of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996). Boyd responds that even though State Farm promoted another African-American to the position, he has met all the elements of a prima facie case for race discrimination. For purposes of summary judgment only, the Court will focus on the issue of pretext and assume, however unlikely it appears, that Boyd has met his prima facie case.

State Farm's burden is to articulate a non-discriminatory reason for the adverse employment action. To that end, State Farm claims that it did not promote Boyd because of his work performance. Specifically, Boyd failed to meet all of his goals for the review period before the position became available. State Farm supports its non-discriminatory reason with evidence of Boyd's performance reviews, Sutton's affidavit, and Sutton's deposition testimony. State Farm has thus met its burden on summary judgment, and Boyd must now rebut this legitimate, non-discriminatory reason for the employment action by offering some evidence of pretext.

Boyd relies on his affidavit, his performance reviews and allegedly racist comments made by Sutton and Vice, Boyd's supervisors, as evidence that State Farm's true reason for failing to promote him was his race. Boyd argues that Sutton's calling Boyd "Buckwheat" and "a porch monkey" are enough, standing alone, to raise a triable issue of pretext for race discrimination. Boyd also claims that he received less favorable performance reviews after he complained to Vice about Sutton's comments.

The "Buckwheat" comment occurred in the fall of 1993. (Boyd Aff. ¶ 3.) Boyd does not state when Sutton called him a "porch monkey," but it was apparently sometime before the "Buckwheat" comment. Boyd states in his response that he was turned down for a promotion repeatedly in 1993 and 1994, and that he complained of this to Sutton in June of 1995. Boyd fails to offer any dates for his promotion denials. Assuming these comments are racist, the Court determines that they are merely stray remarks and are insufficient evidence of discrimination in any employment action. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-56 (5th Cir. 1996).

Boyd states that he relies on other remarks, as well, but in both his deposition testimony and in his affidavit, he cannot attribute them to any specific person, much less to one of his supervisors who denied him the promotion, nor does he recall with clarity when they took place. As such, Boyd's allegations as to these comments are unsupported and self-serving, and they are neither competent evidence that he was denied a promotion because of his race, nor are they evidence of pretext. *See Grimes*, 102 F.3d at 139-40 (unsubstantiated assertions are not competent summary judgment evidence).

Boyd also asserts that the decline in his performance reviews from December of 1993 to December of 1994 reveal discriminatory animus on the part of Sutton and led to the denial of his promotion. Boyd attaches several of his reviews to his response. As State Farm points out, Sutton gave Boyd his one negative review as well as three of his previous good reviews. State Farm also states that it is undisputed that Sutton hired Boyd, selecting him over a white candidate.

The Fifth Circuit has adopted the "same actor" principle, which rebuts an inference of discrimination by the

same person who hired the employee. *See Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997). The Court concludes that Boyd's negative performance review from Sutton fails to create either an inference of discrimination or a triable issue of fact regarding pretext for discrimination.

The Court has reviewed the record on summary judgment, including the deposition testimony of Boyd, and concludes that Boyd has failed to meet his burden on summary judgment. Boyd has failed to place into dispute material issues of fact concerning whether State Farm's reason for not promoting him was race-based discrimination. The Court, therefore, grants summary judgment on Boyd's claims for race discrimination in the denial of a promotion brought under Title VII, 42 U.S.C. § 1981 and the TCHRA.

Claim for Race Discrimination in Termination

Boyd claims he was discharged in violation of Title VII, 42 U.S.C. § 1981 and the TCHRA.[9] The elements of a prima facie case for discriminatory discharge which Boyd must prove are: (1) he was discharged; (2) he was qualified for the position; (3) he was in the protected class; (4) he was replaced by someone outside the class. *See Grimes*, 102 F.3d at 140. Despite some dispute over whether Boyd can show the last element, the Court will again assume that Boyd has stated a prima facie case for a racially discriminatory termination.

State Farm claims that it terminated Boyd only because of his AWOL status, which has been discussed at length herein in the context of Boyd's FMLA claim. As Texas is an at-will employment state, *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993), State Farm can terminate an employee for any reason or no reason as long as it does not do so for a discriminatory reason. The

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[9]The Court will again analyze the race discrimination claims together as if under one statute.

Court concludes that State Farm has articulated a legitimate, nondiscriminatory reason for Boyd's discharge.

Boyd must now come forward with evidence that State Farm's real reason for his termination was not because he was AWOL, but because of his race. Boyd's response focuses on the race of the person who replaced him and assumed his duties after his termination; in other words, Boyd argues for his prima facie case, which the Court has already assumed. As to evidence of pretext, Boyd points only to his classification while on leave. He states that he was told he was on paid sick leave and then later classified as AWOL, and the evidence he provides supports this statement. This discrepancy does not, however, support any inference of race discrimination.

Boyd also alleges that other, non-minority employees out on sick leave were not terminated for being AWOL. He offers no evidence to support this allegation, however. State Farm, on the other hand, identifies two Caucasian employees from Boyd's department who were both terminated for being AWOL for only two and three days, whereas Boyd was

AWOL for ten days before being discharged. (Hill-Vasquez Aff. ¶ 8., Ex. A to Def.'s Am. Mot. for Part. Summ. Judgmt.)

State Farm's most compelling argument that Boyd was not terminated for a discriminatory reason is in the persons responsible for his termination at State Farm: Dr. Margaret Sowada and Gay LaButis of the Medical Department, and Darren Thomas in the Human Resources Department. Boyd does not offer any evidence whatsoever that these persons bore any discriminatory animus to him. Furthermore, State Farm points out that the individual Boyd complains of the most, Bruce Sutton, had no involvement in the decision to terminate Boyd. (Sutton Dep. at 118, 11. 4-8).

After reviewing the record on summary judgment, the Court concludes that Boyd has failed to place into issue whether State Farm's reason for his termination was his status as AWOL. Boyd has failed to rebut State Farm's evidence, which conclusively shows that Boyd was terminated because he failed to return to work after an almost six-week absence. The Court finds no evidence in the record that State Farm discharged Boyd because of his race, nor does

the Court find evidence of pretext for racial discrimination. The Court, therefore, grants summary judgment on Boyd's claims for wrongful termination in violation of Title VII, 42 U.S.C. § 1981 and the TCHRA.

Claim for Gender Discrimination

Boyd alleges gender discrimination in the introduction of his amended complaint, which states, "Plaintiff is a black male who complains of discrimination against him by State Farm on the basis of sex and race, as well as discharge in violation of the FMLA." (Pl.'s First Amend. Compl. ¶ 1.) Boyd makes no other reference to, nor asserts a cause of action for, gender discrimination elsewhere in the pleading. Neither State Farm nor Boyd actually addresses any claim for gender discrimination in the motions for summary judgment and in the response, respectively. The Court concludes, therefore, that Boyd has failed to assert a claim for gender discrimination or, in the alternative, has abandoned any such claim. To the extent that such a claim for gender discrimination exists in the action, the Court dismisses it with prejudice.

Claims for Denial of Due Process and Hostile Work Environment

In his response to the motions, Boyd concedes that summary judgment is appropriate on his claims for denial of due process and hostile work environment. Thus, the Court dismisses with prejudice Boyd's claims for denial of due process and hostile work environment.

Claim for Intentional Infliction of Emotional Distress

Boyd claims that racist comments from State Farm employees caused him severe emotional distress. State Farm moves for summary judgment on Boyd's claim for intentional infliction of emotional distress, arguing that Boyd did not suffer severe distress and that the conduct which Boyd alleges forms the basis of this claim is not, as a matter of law, conduct which is extreme and outrageous.

The only comments Boyd relies on for this claim are that Sutton called him "Buckwheat" and "porch monkey," which Boyd alleges are racist remarks. To prove emotional distress, Boyd must prove that State Farm acted intentionally or recklessly, that the conduct was extreme and outrageous, that the conduct caused Boyd emotional distress, and that the emotional distress was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). State Farm contends that

the actions complained of are not extreme and outrageous as a matter of law.

An employer's conduct is extreme and outrageous when that conduct exceeds all bounds usually tolerated by civilized society and is calculated to cause serious emotional distress. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 & n.28 (5th Cir. 1994). It is not enough that State Farm may have acted with criminal or tortious intent or that its conduct may be characterized by malice. *Id.*; *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1142-43 (5th Cir. 1991). The conduct occurred within the course of a running employment dispute, *Wilson*, 939 F.2d at 1145 (stating that only in the "*most* unusual cases" will conduct occurring in the employment context give rise to an independent claim for intentional infliction of emotional distress) (emphasis in original), and is the same conduct that underlies his claims of discrimination. *See also Wornick Co. v. Casas*, 856 S.W.2d 732, 734-35 (Tex. 1993) (holding an employer's conduct in summarily dismissing an employee and having her escorted from the premises by security guards was not extreme and outrageous); *Guthrie v. Tifco Indust.*, 941 F.2d 374, 379 (5th

Cir. 1991) (an organized and premeditated discharge is not extreme and outrageous), *cert. denied*, 503 U.S. 908 (1992); and *Cook v. Fidelity Investments*, 908 F. Supp. 438, 440-41 (N.D.Tex. 1995).

As a matter of law, the Court concludes that the comments upon which Boyd relies to support this claim do not rise to the level necessary to support a claim for emotional distress. The Court, therefore, grants summary judgment on Boyd's claim for intentional infliction of emotional distress.

In summary, the Court grants summary judgment as to all of Boyd's claims and will dismiss each with prejudice. Judgment will be entered accordingly.

It is therefore **ORDERED** that Defendant State Farm's Amended Motion for Partial Summary Judgment, filed on April 14, 1997, which is incorporated by reference into State Farm's pending Motion for Summary Judgment, filed on July 31, 1997, is **granted**.

It is **FURTHER ORDERED** that Defendant State Farm's Motion for Summary Judgment, filed on July 31, 1997, is **granted**.

Signed this 17th day of November, 1997.

/s/

Robert B. Maloney
U.S. District Judge

APPENDIX C

FILED NOVEMBER 17, 1997
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JIMMY BOYD,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1976-T
	§	
STATE FARM	§	
AUTOMOBILE	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that Plaintiff Jimmy Boyd's claims made herein against State Farm Automobile Insurance Company are **dismissed with prejudice.**

It is **FURTHER ORDERED** and **ADJUDGED** that each party shall bear its own costs.

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 17th day of November, 1997.

/s/

Robert B. Maloney
U.S. District Judge

APPENDIX D

29 U.S.C. § 2612(a)(1)(D) (1994):

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

. . .

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 C.F.R. § 825.115 (1998):

§ 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee?

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the regulations at 29 C.F.R. § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health

condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

29 C.F.R. § 825.301(b)(1) (1998):

The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet those obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.330(c)). Such specific notice must include, as appropriate . . .

(ii) any requirements for the employee to furnish medical certification and the consequences of failing to do so (see § 825.305); . . . .

29 C.F.R. § 825.301(c) (1998):

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notiuce of the need for leave is given by the employee - within one of two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one of two business days of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be

unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall *not* be required if the initial notice in the six-months period *and* the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See § 825.305(a)).

29 C.F.R. § 825.305(a) (1998):

. . . An employer must give notice of a requirement for medical certification each time a certification is required; such

notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

29 C.F.R. § 825.305(b) (1998):

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances despite the employee's diligent, good faith efforts.

Supreme Court, U.S.
FILED
MAR 5 1999
CLERK

No. 98-1229

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JIMMY BOYD,

Petitioner,

v.

STATE FARM INSURANCE COMPANIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE AFFILIATIONS

The petition lists "State Farm Insurance Companies" as respondent in this proceeding. There is no legal entity named "State Farm Insurance Companies." Petitioner was employed by State Farm Mutual Automobile Insurance Company, which was the entity that appeared both as the defendant in the trial court and as the Appellee in the Court of Appeals, and it is State Farm Mutual Automobile Insurance Company that is appearing as Respondent in this proceeding.

Respondent, State Farm Mutual Automobile Insurance Company, has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The Petitioner was employed with Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), beginning in 1990, in the Administrative Services Department. He was hired by Bruce Sutton, his eventual supervisor, who selected him over a Caucasian applicant. Mr. Sutton was Petitioner's direct supervisor for most of his tenure at State Farm, and awarded him numerous raises and promotions, which were approved by Terry Vice, the manager of the department. In June of 1995, the Petitioner submitted a written request to Mr. Sutton for a promotion from his current title of Supervisor III to Supervisor IV. However, Petitioner's most recent performance evaluation, administered to him in December of 1994, reflected that the Petitioner had achieved only seven (7) of the ten (10) goals which he, Mr. Vice, and Mr. Sutton had agreed upon the preceding year. For that reason, Mr. Vice and Mr. Sutton concluded that the Petitioner had not yet achieved a level of work performance that would justify promotion to Supervisor IV.

During August of 1995, Petitioner obtained State Farm's FMLA booklet and acquainted himself with the policies contained therein. The booklet states that medical certification for FMLA leave is automatically required for leave requests that exceed five (5) days. Petitioner admitted that, after reviewing the FMLA booklet, he was aware that State Farm had the right to request medical certification, and to deny FMLA leave, where proper medical certification was not provided. On August 8, 1995, Petitioner submitted a request for FMLA leave and simply stopped coming to work. Over the course of the next month, Darren Thomas and Gay Labutis, who worked in the Human Resources and Medical Departments, respectively, contacted Petitioner numerous times requesting proper medical certification that Petitioner was incapacitated and indicating a

probable duration for his leave. The Petitioner kept detailed records of these telephone conversations, including the precise nature of State Farm's requests for certification. In response to those requests, the Petitioner sent State Farm two (2) notes from his psychological care providers — Dr. John Pascoe and David Colley. However, neither of these letters in any way indicated that the Petitioner was unable to work or gave a probable duration for his leave from work.[1] Each time the Petitioner sent one of these insufficient letters to State Farm, either Mr. Thomas or Ms. Labutis contacted him and informed him that his absence from work was still not supported by proper medical certification, and that he needed to return to work immediately.

On September 6, 1995, almost one month after Petitioner stopped coming to work, State Farm sent him a letter, notifying him that he had been classified as Absent Without Official Leave ("AWOL"), due to his failure to provide proper certification. The letter also requested medical certification from him one last time. Mr. Thomas also communicated this to the Petitioner in a telephone conversation on September 8, 1995, which was documented in detail by the Petitioner. In response to these last two requests, the Petitioner sent State Farm one more note from Mr. Colley, dated September 11, 1995. However, as before, this note did not in any way indicate a medical need for the Petitioner to remain absent from work. Therefore, on September 15, 1995, after the Petitioner had been absent from work for a total of five weeks, State Farm terminated his employment on the grounds that he had been classified as AWOL for ten days.

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1. In their depositions, both Dr. Pascoe and Mr. Colley testified that they did *not* consider the Petitioner to be incapacitated from working, which explains why none of the notes they wrote on his behalf contained any statements to that effect.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for *certiorari* for the following reasons:

I.

RESOLUTION OF THE PETITIONER'S QUESTION REGARDING THE FIFTEEN-DAY NOTICE PROVISION CONTAINED IN THE FMLA REGULATIONS WOULD NOT AFFECT THE OUTCOME OF THIS CASE.

The first question presented by Petitioner is whether the Court of Appeals properly interpreted the FMLA regulation which requires employers to give employees fifteen days to provide proper medical certification for an FMLA leave of absence. However, that particular issue, as phrased by Petitioner, did not even control the outcome of the appeal, because the Court of Appeals already had determined that the Petitioner did not suffer from a "serious health condition" at the time he requested leave and, therefore, was not entitled to protection under the FMLA.

The FMLA itself provides that an employee is only entitled to FMLA leave for himself "because of a serious health condition *that makes the employee unable to perform the functions of the positions of such employee*." 29 U.S.C. § 2612(a)(1)(D) (1995) (emphasis added). The FMLA regulations further explain that, in order to be entitled to FMLA leave, an employee must suffer from a "period of incapacity," which renders the employee unable to "work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore or recovery therefrom." 29 C.F.R. § 825.114(a)(2)(i). Every court that has reached this issue has either expressly or impliedly required a showing of incapacity

in order for an employee to be entitled to FMLA leave. *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 698 (5th Cir. 1997); *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123 (8th Cir. 1997).[2] Petitioner's own doctor and psychotherapist testified that he was not incapacitated from working at the time that he requested leave from work. On those grounds, the Circuit Court, following unanimous holdings across the country to this effect, held that the Petitioner was not entitled to FMLA leave and upheld dismissal of Petitioner's FMLA claim on those grounds. Therefore, review of the question presented by Petitioner regarding the fifteen-day notice provision in the regulations would not even have the potential to alter the outcome of the case and *certiorari* should be denied.

The Petitioner apparently also takes issue (without presenting a question for review) with the Fifth Circuit's holding that the District Court did not commit manifest error in rejecting the affidavit of Petitioner's expert, Dr. Emerson Emory, which was submitted in an attempt to rebut Dr. Pascoe's and Mr. Colley's testimony that he was not incapacitated from working. The District Court rejected the affidavit on the grounds that it was vague, conclusory, and replete with legal terms of art. As the Petitioner concedes, Rule 56(e) of the Federal Rules

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2. *See also Stoops v. One-Call Communications, Inc.*, 141 F.3d 309 (7th Cir. 1998); *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997); *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 106 (D.R.I. 1997); *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997); *Rhoads v. FDIC*, 956 F. Supp. 1239, 1255 (D.Md. 1997); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 997-98 (N.D.Ga. 1996); *George v. Associated Stationers*, 932 F. Supp. 1012, 1015-16 (N.D. Ohio 1996); *Hott v. VDO Yazaki, Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D. Kan. 1996); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310-11 (E.D.Ky. 1996); *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036-37 (M.D.Tenn. 1995); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 243 (E.D.Pa. 1994).

of the Civil Procedure requires that affidavits submitted in response to a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." The Petitioner would have this Court grant *certiorari* to second-guess the Circuit Court's application of this Federal Rule of Civil Procedure. Under this Court's rules, "[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Rules of the Supreme Court of the United States*, Rule 10 (1997). *See also Appalachian Power Co. v. American Inst. of Certified Public Accountants*, 80 S. Ct. 16, 18, 4 L. Ed. 2d 30, 32 (1959). Dr. Emory's affidavit was the only evidence presented by Petitioner in response to the testimony of Dr. Pascoe and Mr. Colley that he was not incapacitated from working, and the District Court properly disregarded that evidence. Therefore, the summary judgment evidence established that Petitioner was never entitled to FMLA leave in the first place, and resolution of the presented question regarding the fifteen-day waiting period for medical certification would not affect the outcome in this case. Accordingly, this Court should deny the Petition for Writ of *Certiorari*.

II.

REVIEW OF THE FMLA NOTICE PROVISIONS IS NOT NECESSARY BECAUSE THE CIRCUIT COURT INTERPRETED THEM CORRECTLY AND, IN THE ALTERNATIVE, THE ISSUE IS NOT RIPE FOR DECISION BY THIS COURT.

The Petitioner takes issue with the Circuit Court's interpretation of the notice provisions contained in the FMLA regulations. The specific regulations at issue deal with the inter-relationship between the notice required to be given to

employees regarding the need for medical certification and the employer's rights when such a certification is not forthcoming from the employee. Petitioner carefully parses several of the regulations to argue that State Farm's notification to him that medical certification was required was insufficient. However, the Circuit Court's decision was based upon a common sense reading of the regulations as requiring actual, sufficient notice to the employee, in whatever form, of the need for medical certification. Moreover, there is no dispute that, just days prior to requesting leave, Petitioner read State Farm's FMLA booklet and understood that State Farm required medical certification for every leave request like his. Furthermore, Petitioner's handwritten notes and deposition testimony establish State Farm's exhaustive efforts to obtain proper medical certification from him, and the content of those handwritten notes (reciting the substance of the conversations) establishes that the Petitioner *understood* what was being requested of him. Based upon that undisputed evidence, the Court determined that the Petitioner had received *actual* (and abundant) notice of his obligation to provide proper medical certification for his leave request. This holding in no way contravenes the letter, or the intent, of the FMLA and, therefore, review by this Court is not necessary.

The Petitioner also takes issue with the Circuit Court's holding that, once an employee has responded to a written request for medical certification, the regulation providing for fifteen days in which to submit that certification is no longer implicated. The fallacy in Petitioner's logic is that he confuses the *duty* of the employer to give the employee 15 days to provide the required certification with the *right* of the employer to base subsequent actions on the nature of the certification provided. In this case, the certification was insufficient to support a request for FMLA leave, and the employer's decision to terminate Petitioner's employment because he was AWOL was

clearly lawful. The passage of five days' additional time would confer no greater status on the certification than it possessed upon receipt by State Farm, and the argument that the 15 days permitted to submit the certification bars the employer from taking action once it has been received is non-sensical and should be disregarded by this Court.

Petitioner has presented no authority to support his interpretation of the regulation. By way of contrast, the one case from another circuit which deals with an analogous situation is in accord with the decision of the Court of Appeals in this case. In *Dillon v. Carlton*, 977 F. Supp. 1155 (M.D. Fla. 1997), the plaintiff requested FMLA leave, to commence two weeks from the date of the request. The employer did not request medical certification until three days before the leave was to commence, and the plaintiff submitted the certification on the day she planned to begin her leave. The plaintiff complained that the employer had violated the FMLA regulation requiring a request for certification to be made "within two business days" after the leave request. The court held, however, that since the plaintiff had been able to submit the certification prior to commencement of her leave, the regulation at issue was moot. The Petitioner failed to demonstrate a split in the circuit courts on this issue, and the only other similar decision to date is in accord with the decision of the Circuit Court. The petition for *certiorari* should be denied.

III.

THE PETITIONER'S RACE DISCRIMINATION CLAIM WAS PROPERLY DISMISSED AND SHOULD NOT BE REVIEWED BY THIS COURT.

The petition for *certiorari* presents a truly "one-sided" synopsis of the summary judgment evidence regarding the

Petitioner's race discrimination claim. In fact, the Petitioner's brief ignores the entire grounds upon which the Circuit Court affirmed summary judgment on that claim. For example, the Petitioner points out two alleged racist comments by Bruce Sutton, but fails to point out that both comments allegedly were made more than one year prior to the denial of Petitioners' request for a promotion, and were in no way related to his employment with State Farm. It was on these grounds that the Court found those two alleged comments to be "stray remarks," which have been recognized by this Court as simply not being probative of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). Similarly, Petitioner fails to point out that Mr. Sutton (the alleged discriminator) actually hired him in the first place which, in most circuits, gives rise to an inference of no discrimination.[3]

With regard to the claim for discriminatory termination, the Petitioner fails to point out that the undisputed summary judgment evidence proves that Bruce Sutton — the only individual for whom the Petitioner alleged any discriminatory animus — was not even involved in the decision to terminate his employment. In short, the petition for *certiorari* in no way addresses the evidentiary grounds for the Circuit Court's affirmation of summary judgment on the Petitioner's discrimination claim. Furthermore, this Courts' own rules provide that granting *certiorari* is rarely proper when the asserted error "consists of erroneous factual findings or the

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3. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1998); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991).

misapplication of a properly stated rule of law." *Rules of the Supreme Court of the United States*, Rule 11 (1997). *See also N.L.R.B. v. Waterman S.S. Corp.*, 309 U.S. 206-208, 60 S. Ct. 496, 495, 84 L. Ed. 704, 706 (1939). Therefore, the issues presented by the Petitioner regarding his claims of race discrimination are not proper for review by this Court and the Petition for Writ of *Certiorari* should be denied.

CONCLUSION

For the reasons given above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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